IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 206 OF 2020

BETWEEN

ELIAS NALIGIA .....APPLICANT

VERSUS

MBEZI BEACH SECONDARY SCHOOL ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

An aggrieved applicant has moved this court under the provisions of Section 91(1)(a) & 91(2)(a), (b) & (c) and Section 94(1)(b)(i) and (d) of the Employment and Labour Relations Act No. 6 of 2004 ("ELRA") and Rule 24(1), 24(2) (a),(b),(c),(d),(e), (f) and 24 (3) (a),(b)(c),(d) and 28 (1)(a),(c),(d), & (e) of the Labour Court Rules, GN. No. 106/2007("the Rules"), seeking for the following orders:

1. That, this Honourable Court be pleased to call for and examine, revise and set aside the arbitral award made against the Applicant by the Commission for Mediation and Arbitration, before Honourable Mbeyale, R. (arbitrator) dated 27/04/2020 in Labour Dispute No. CMA/DSM/KIN/303/19/137.

2. Costs of the suit.
3. Any other Reliefs' or Orders that this Honourable Court may deem just to grant.

The application was supported by an affidavit of the applicant dated 03rd day of June, 2020. The respondent opposed the application by lodging a notice of application under the provisions of Rule 24(4) of the Rules along with a counter affidavit deponed by one Eliaicha Aron Ndowo, learned Counsel representing the respondent dated 29th June, 2020. Before this court, the applicant appeared in person and unrepresented while the respondent was represented by Ms. Eliaicha Ndowo, learned advocate. The application was disposed by way of written submissions.

From the gathered facts, the history of the employment relationship between the parties herein dates back to the year 2017 when the applicant was employed by the respondent as a teacher at Dar-es-salaam. In the subsequent year 2018, the applicant was promoted to Head of Mathematics Department. According to the applicant, the dispute arose when the Applicant was denied a loan for sponsoring his children who were studying at IFM and instead, he was given salary advance. Alleging to have been devastated, the applicant requested for some days off by writing the

message to the school head master, second master and academic teacher. He then went absent from work between the 06/03/2019 to 12/03/2019, a total of 6 days while at that time he was responsible for teaching Basic Mathematics to Form I students.

When asked to explain about his absence (EXM6), the applicant explained that he had missed school due to psychological problems and he also apologized (EXM6). He was then called for disciplinary hearing (EXM1) and was eventually terminated on 28/03/2019 (EXM9). Upon termination, he was also issued with a certificate of service.

Having considered the parties submissions, the main contention of the applicant is that the CMA did not consider the evidence he adduced during arbitration. On my part, I find that the main complaint revolves around the common issues in Labor Disputes, whether the termination of the applicant was fair procedurally and substantively.

Starting with the EXM8, call for a disciplinary hearing, the applicant was charged with the offence of abseentism and that is the charge that the respondent convicted him of and eventually terminated him. It started with the Collective EXM7, a letter dated 12/03/2019 which asked the applicant

to explain of his absence. Then on the same exhibit, through a letter dated the same 12/03/2019, the applicant replied to the respondent by apologizing and explaining that his absence was caused by the socio-economic problems that he was facing. He explained the problems to be short of money to pay for his children's fees, house rent, money for the children's welfare and a loan of Tshs 600,000/- he had, amongst other things. He then apologized and promised his employer not to do the same again. In the end, he asked for a loan of a total of Tshs. 2,500,000/-. The respondent went ahead to call him for disciplinary hearing and proceeded to terminate the applicant. It is therefore conclusive that the applicant was terminated due to abseentism. What I have to make a finding is whether abseentism of the respondent for 6 days is a good ground for termination.

Abseentism may simply be defined as any failure to report for or remain at work as scheduled, regardless of the reason (Cascio & Boudreau, 2015). The absence from work is usually unplanned, for example, when someone falls ill. It may however be planned for example during a strike or a willful absence. The key to this definition is that the person was scheduled to work but is not at workplace. This means that absenteeism does not include vacation, personal leave or any absence that is justified

under the law. In our law, there is no specific provision which terms abseentism as a good cause for termination, that is, abseentism is not clearly stated in our law as one of the grounds of termination under Section 36(1) of the ELRA. Therefore in this case, the termination is based on the provisions of Section 37(2)(b)(i) of the ELRA. For the provisions of that Section to be termed as fair, like in our case for reason of abseentism, then the provisions of Rule 12 of the Employment and Labor Relations (Code of Good Practice) Rules, G.N. No. 42/2007 ("the Code") have to be complied with. Rule 12 of the Code provides:

"12.-(1) Any employer, arbitrator or judge who is required to decide as to termination for misconduct is unfair shall consider-

(a) whether or not the employee contravened a rule or standard regulating conduct relating to employment;

(b) if the rule or standard was contravened, whether

(i) it is reasonable

(ii) it is clear and unambiguous;

(iii) the employee was aware of it, or could reasonably be expected to have been aware of it;

(iv) it has been consistently applied by the employer; and

(v) termination is an appropriate sanction for contravening it."

In this case, it was undisputed that there is indeed a rule or standard contravened by the applicant and he was aware of it, but the question is under Rule 12(1)(a)(v), whether termination was the appropriate sanction for the contravention of the said rule. Therefore the employer ought to have considered the mitigating factors that were advanced by the applicant before making a decision to terminate him. As observed, the applicant explained the reasons for his absence to include socio-economic problems that he was facing which impaired his psychological well-being. The employer should have considered that from the nature of the job that the applicant was involved in, teaching students of Form IV, any vulnerability in the applicant's psychological stability would have been dangerous to expose to the children. This is cemented by the provisions of Rule 12 (2) of the Code which provides:

*"**First offence** of an employee **shall not justify termination unless it is proved that the misconduct is so serious that it makes a continued employment relationship intolerable**.*

(3) The acts which may justify termination are-

(a) gross dishonesty;

(b) willful damage to property

(c) willful endangering the safety of others;

(d) gross negligence;

(e) assault on a co-employ, supplier, customer or a member of the: family of, and any person associated with, the employer; and

(f) gross insubordination"

From the facts of this case, I would even reason that by being absent from work, the applicant might have avoided to fall under the category of Rule 12(3)(a) because if he pleaded psychological instability, who knows what would have happened had he come to school and be in charge of the young students? Therefore for the employer to have terminated the applicant on the first offence which is not defined in our law, which does not also fall under Rule 12 of the Code, it was nothing but an unfair termination considering the mitigating factors put forth by the applicant under Rule 13(7) of the Code. The applicant could have even gotten off with a warning or another punishment lesser than termination.

On the above findings, I find the termination of the applicant to be substantively unfair. Having so found that the substantive reason of termination was fair, I see no reason to dwell on the remaining part of procedural fairness as the reliefs granted would be one and not separate for each part, after all substantive fairness carries more weight in awarding compensation to the employee. At this point, this revision is allowed and the award of the CMA is revised.

Before proceeding to award compensation, I must deal with a fact I have noted in the records. In his CMA Form No. 1, the applicant's reason for lodging a dispute was unfair termination, but the records are clear that the applicant was under a short term contract of one year beginning 01/01/2019 to 31/12/2019. The termination was on 28/03/2019. On this note, I have taken the stance in the holding of this court in the case of **Good Samaritan Vs. Joseph Robert Savari Munthu, Labour Revision No. 165 of 2011 reported in High Court Labour Digest No 09 of 2013** where it was held that:

"When an employer terminates a fixed term contract the loss of salary by the employee of the remaining period unexpired term is a direct foreseeable and reasonable consequence of the employers

wrongful action. Therefore in this case, probable consequence of the applicant's action was loss of salary for the remaining period of the employment contract which was 21 months."

The remedy available under such circumstance is for the employer to pay the applicant's salary for remaining period of the contract and a salary in lieu of notice (as per the EXM1). The records show that the applicant was paid his April salary so the respondent will pay the applicant a compensation which a salary of 9 months that remained in the fixed term contract. The applicant's salary is 9 months X Tshs 800,000/- which is a total of **Tshs. 7,200,000/-.**

Dated at Dar-es-salaam this 01st day of April, 2022

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S.M. MAGHIMBI

JUDGE